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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 180

W. S. TATUM, ET AL.,
Petitioners,

vs.

JOE B. SINGER, ET AL.,
Respondents.

MOTION FOR ABSTENTION OF PETITIONERS UNDER CITY OF MERIDIAN v. SOUTHERN BELL TEL. & TEL. CO., 358 U.S. 639, 3 L.ed. 2d 562, AND LOUISIANA POWER & LIGHT COMPANY v. THIBODAUX, 360 U.S. 25, 3 L.ed. 2d 1058, HOWEVER, RESERVING PETITIONERS' RIGHT TO A DETERMINATION OF ITS CONSTITUTIONAL PRIVILEGES HERE.

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INDEX

Statement of the Case 2
Authorities 10
Certificate of Service 24
Appendix "A" 25

Table of Cases

Adams County v. *State Educational Finance Commission*, 229 Miss. 566, 91 So.2d 524 7
Angel v. *Bullington*, 330 U.S. 183, 91 L. ed. 832 9
Arizona Grocery Co. v. *Atchison, T. & S. F. R. Co.*, 284 U.S. 600, 76 L. ed. 515 6
Baggett v. *Bullitt*, 377 U.S. 360, 376, 12 L. ed. 2d 377, 388 12
City of Meridian v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 3 L. ed. 2d 562 ..... 1, 2, 10
Clay v. *Sun Insurance Office*, 363 U.S. 207, 212, 4 L. ed. 2d 1170, 1176 ..... 15, 16
County of Allegheny v. *Frank Mashuda Company*, 360 U.S. 185, 189, 3 L. ed 2d 1163, 1166 11
Crider v. *Zurich Ins. Co.*, 380 U.S. 39, 13 L.ed 2d 641 22
Dombrowski v. *Pfister*, ... U.S. ....., 14 L.ed 2d 22 20
Dowling v. *Canal Bank & Trust Co.*, 216 La. 372, 43 So.2d 763 20
England v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L. ed. 2d 440 ..... 2, 18, 19
Fauntleroy v. *Lum*, 210 U.S. 230, 52 L. ed. 1039 8
Fortson v. *Toombs*, 379 U.S. 621, 13 L. ed. 2d 527, 534 14
Fox v. *Pearl River Lumber Co.*, 80 Miss. 1, 31 So. 583 23
Garner v. *Louisiana*, 368 U.S. 157, 189, 7 L. ed. 2d 157, 228 ..... 14, 15, 23
Government Employees v. *Windsor*, 353 U.S. 364, 1 L.ed. 2d 894 20
Griffin v. *School Board of Prince Edward County*, 377 U.S. 218, 12 L. ed. 2d 256 ..... 8, 14

Henry v. *Mississippi*, 379 U.S. 443, 13 L.ed. 2d 408, 415 21
Hiern v. *Interstate Trust & Banking Co.*, 178 La. 998, 152 So. 684 20
Hostetter v. *Idlewild Liquor Corp.*, 377 U.S. 324, 329, 12 L. ed. 2d 350 14
In re Hibernia Bank & Trust Co., 203 La. 195, 13 So.2d 833 20
In re Liquidation of Hibernia Bank & Trust Co., 205 La. 890, 18 So.2d 330 ..... 9, 20
Interstate Trust & Banking Co. v. *Jones County, Miss.*, C.A. 5, 77 F.2d 806 20
Liquidation of Canal Bank & Trust Co., 211 La. 803, 30 So.2d 841 20
Louisiana Power & Light Company v. *Thibodaux*, 360 U.S. 25, 3 L. ed. 2d 1058 ..... 1, 2, 11, 12, 13, 14
Martin v. *Creasy*, 360 U.S. 219, 226, 3 L.ed. 2d 1186, 1190 16
Northern Pacific R. Co. v. *Soderberg*, 188 U.S. 526, 47 L.ed 575 23
Public Service Commission v. *United States*, 356 U.S. 421, 436, 2 L. ed. 2d 886, 897 6
Railroad Com. v. *Pullman Co.*, 312 U.S. 496, 85 L. ed. 971 13
Relf v. *Rundle*, 103 U.S. 222, 26 L.ed. 337 22
Simons v. *Miami First National Bank*, ... U.S. ....., 14 L. ed. 2d 232 8
Southern Bell Tel. & Tel. Co. v. *Meridian*, D.C. Miss., 154 F. Supp. 736 10
United Services Life Insurance Company v. *Delaney*, C.A. 5, 328 F.2d 483, 484, 486, 487 ..... 16, 17, 18
United States v. *Mersky*, 361 U.S. 431, 4 L. ed. 2d 423 6
Witherspoon v. *Campbell*, 219 Miss. 640, 69 So.2d 384 23

OTHER AUTHORITIES.

Annotation, 3 L.ed. 2d 1827, 1831; 94 L.ed. 879 12
Louisiana Constitution, Article 6, Section 18 2
Louisiana Revised Statutes, 6:386 and 6:401 2

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Now come Petitioners and move the Court that under *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 3 L.ed. 2d 562, and *Louisiana Power & Light Company* v. *Thibodaux*, 360 U.S. 25, 3 L.ed. 2d 1058, this Court abstain from determination of the merits of the Petition for Writ of Certiorari until the Supreme Court of Louisiana shall have determined whether Petitioners' property is subject to a reservation of "oil, mineral, gas and petroleum" (Ap-

pendix "H", Petition for Writ of Certiorari, p. A54), or to a reservation of "all of the minerals and mineral rights, including oil, gas and other hydrocarbons, sulphur, gravel, salt and all other minerals and mineral rights in, on and under the lands described", as assumed to be held by the Supreme Court of Mississippi, provided such determination is promptly initiated and conducted, Petitioners making the reservations prescribed in *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L.ed. 2d 440.

STATEMENT OF THE CASE

1. Initially Petitioners claimed that the State Bank Commissioners, J. S. Brock, J. W. Jeansonne and A. Clayton James, all concurred in Petitioners' contention that the reservation of "oil, mineral, gas and petroleum" accurately admeasured Petitioners' rights and that these several Commissioners had therein acquiesced. This Court was asked to reverse and render because there was no uncertainty in the law of Louisiana thereasto; but since the filing of the Petition, A. Clayton James, State Bank Commissioner, and Joseph J. Cangiamilla, Special Agent, have taken the position hereinafter set forth whereby, with deference, the rule of the *Telephone Case* and the *Thibodaux Case*, *supra*, as to abstention while controlling demand that the Supreme Court of Louisiana resolve the doubts expressed by the State Bank Commissioner.

2. Reasons for this Motion:

(a) In 1937, J. S. Brock was a constitutional officer of Louisiana as State Bank Commissioner with plenary authority according to its *Constitution*, Article 6, Section 18, and *Revised Statutes* 6:386 and 6:401. Brock, acting through R. N. Sims, Special Agent and J. Edward McGuire, Liquidator, delivered to W. S. F. Tatum the warranty deed, said Appendix "H", wherein the recitals are:

"FOR AND IN CONSIDERATION OF ONE HUNDRED FORTY THOUSAND ($140,000.00) Dollars, good and lawful money of the United States of America cash paid by W. S. F. Tatum of Hattiesburg, Mississippi, grantee herein, to Hibernia Bank and Trust Company, in Liquidation, *herein represented by J. S. Brock, State Bank Commissioner for the State of Louisiana,* through his special agent, R. N. Sims, and J. Edward McGuire, Liquidator, in charge of the Hibernia Bank & Trust Company, in Liquidation of New Orleans, Louisiana, grantor herein, *hereunto duly authorized under and by virtue of an order of the Honorable Civil District Court for the Parish of Orleans, State of Louisiana, rendered on the 30th day of December, 1937, in proceedings entitled-, 'In re: Liquidation of Hibernia Bank and Trust Company', No. 202,253, of the docket of said Court, a certified copy of which order is hereto annexed and made a part hereof,* does hereby sell, convey, warrant, transfer and deliver unto the aforesaid W. S. F. Tatum of Hattiesburg, Mississippi, the following described lands and property, including everything of value thereon, therein, or appertaining thereto * * *." (Emphasis is ours, unless otherwise noted.)

This deed contained this reservation, p. A67:

"The grantor herein reserves unto itself, its agents or assigns, the oil, mineral, gas and petroleum, on, in or beneath all the lands herein conveyed which are situated in township One North, Range sixteen west, and in township two North, Range Sixteen West, in Lamar County, Mississippi, and the oil, mineral, gas and petroleum, rights and ownership so reserved by this conveyance are restricted solely to the lands herein conveyed in said township one and two North, range sixteen West, Lamar County, Mississippi. * * *"

This deed did not have attached the order of Judge Byrnes as expressly recited on its face; but was duly recorded in the office of the Chancery Clerk of Lamar County, Mississippi, in Book GG, page 515; and, as shown by the testimony,

Petitioners took possession and appropriated therefrom the gravel. Mr. Justice Brady's opinion made express reference to such appropriations.

(b) Petitioners have remained as owners in actual possession continuously of the land, claiming ownership under said deed.

(c) J. S. Brock having ceased to be State Bank Commissioner, in October 1959, the constitutional officer of Louisiana was J. W. Jeansonne; and on October 7, 1959, he delivered to Respondents a deed as ordered by the Civil District Court of the Parish of Orleans in said Cause No. 202-253, wherein the description of that conveyed was:

> "100% Mineral Interest in 8,788.67 acres, more or less, in Lamar County, Mississippi, reserved from sale to W. S. F. Tatum, *by act of sale passed before A. P. Miceli, Notary Public, on December 30, 1937, recorded in Land Deed Record Book G.G., pages 515-522, in the office of the Chancery Clerk, Lamar County, Mississippi.*"

Petitioners still continued in undisturbed possession. A. Clayton James succeeded J. W. Jeansonne as State Bank Commissioner, with Joseph J. Cangiamilla, Special Agent. On June 14, 1965, the Liquidation had not made any conveyance to Respondents other than in accordance with the foregoing. On that date, Petitioners requested a deed of ratification due to certain alleged defects in the original conveyance, among others, that there was no order of the Civil District Court attached to the deed of December 30, 1937. The then State Bank Commissioner, through Joseph J. Cangiamilla, Special Agent, by his attorney, for the first time on behalf of the Liquidation wrote as follows:

> "Joseph J. Cangiamilla, Special Agent, for the Hibernia Bank and Trust Company, in Liquidation, has referred to me your letters of June 14th and July 10th, 1965.

"It is with regret that I inform you that the Liquidation will be unable to execute the Deed of Confirmation and Ratification that you requested. As you state in your letter (a great many of the actors in this transaction are now dead; and the records are somewhat possibly destroyed); and it is impossible for A. Clayton James, the State Bank Commissioners, and Joseph J. Cangiamilla, the Special Agent for the Liquidation, to know what actually was the intent of the parties at the time. Obviously, there is much ambiguity surrounding the transaction because the Supreme Court of Mississippi has already reversed the decision of the Chancellor.

"Please understand that Mr. James, Mr. Cangiamilla, and myself are not trying to be uncooperative. We simply can not take it upon ourselves to grant the requested Deed of Confirmation and Ratification when we were not totally familiar with the intention of the parties. I will be very happy to discuss the matter with you."

See also Appendix "A" hereto. Thereupon, said Liquidation, through its attorney agreed to cooperate with Petitioners toward having the controlling Louisiana law settled and by agreement, at the suggestion of the Liquidation, Robert Rainold, Esquire, of the firm of Baldwin, Haspel, Molony, Rainold & Meyer, New Orleans, Louisiana, was employed to make a determination in the Courts of Louisiana as to what was the true reservation. Petitioners are anxious to forthwith effect the determination of what the local law of the State of Louisiana thereasto is.

(d) The deed was a contract executed by the State of Louisiana under its Constitution and laws and, in addition, under a judgment of the Civil District Court. To both deed and judgment, full faith and credit had to be given by Mississippi. The Mississippi Court basically erred when it assumed, as a question of fact, to determine that done administratively by Louisiana. Petitioners contend that this

exercise of the police power by Brock, a constitutional officer under delegated legislative power, closely approximated "little laws", *United States* v. *Mersky*, 361 U.S. 431, 4 L.ed. 2d 423; or "statutes", *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U.S. 600, 76 L.ed. 515, whereasto the judicial power was so episodic (*Public Service Commission* v. *United States*, 356 U.S. 421, 436, 2 L.ed. 2d 886, 897) as not to be effective to judicially reform. The exclusive power of disposition had to accord with the Constitution and laws of Louisiana; and if such power were exercised, it had to be given full faith and credit in Mississippi which was without constitutional power to clarify ambiguities, if there were any. Louisiana alone could constitutionally say what was meant.

(e) Let it be specifically noted that when Tatum had paid $140,000.00 and taken possession and when the Liquidation under J. W. Jeansonne undertook to sell the reservation made, none of the Petitioners were made parties to that proceeding in the Civil District Court. W. S. F. Tatum had been dead many years and Petitioners for the most part were complete strangers to the original transaction. They had no notice whatsoever thereof, which is vital herein when in virtue of that thereat done, solely, substantially, the Supreme Court of Mississippi reformed "oil, mineral, gas and petroleum" into "all of the minerals and mineral rights, including oil, gas and other hydrocarbons, sulphur, gravel, salt and all other minerals and mineral rights in, on and under the lands described".

(f) More especially, further, the Supreme Court of Mississippi assumed to assert that the right of Petitioners was divested through the order of the Civil District Court authorizing the deed to Tatum. This, with deference, is a clear mis-statement of the record. That petition and that order do not appear in the record before this Court at any point: and when the Supreme Court of Mississippi assumed

to determine under its power as to the alleged law of the State of Louisiana in disposing of these assets under a specific judgment when that judgment was not before the Court, it basically, with deference, transgressed. Compare *Adams County* v. *State Educational Finance Commission*, 229 Miss. 566, 91 So.2d 524. In the Supreme Court of Mississippi, at page 3 of the Suggestion of Error, and other points, the contention of Respondents that this petition and order were in the record was specifically denied, it being there said:

> "The petition and order of the Louisiana Court authorizing the deed were not before the Chancery Court and are not before this Court. It is conceded that under the deed itself there were reserved 'oil, gas, mineral and petroleum', all else being conveyed validly to Tatum. That now determined by this Court is that, in virtue of the declaration as to the proffered deed, these four words are to be eliminated from the deed and without any conveyance from the Liquidation to the Appellants, the Appellants are to become the owners of 'all the minerals and mineral rights, including oil, gas and other hydrocarbons, sulphur, gravel, salt, and all other minerals and mineral rights in, on and under the lands.' "

On the record before this Court now on file, which contains everything in the record before the learned Chancellor, we repeat the challenge. So when the judgment of the Court of Louisiana was rendered directing its constitutional officer to do this specific thing and those vested with that power so did, the question is, under the Louisiana law, what was the effect thereof? Certainly this is a local question. Furthermore, Petitioners do not deny that in the collateral agreement signed and delivered by J. S. Brock, State Bank Commissioner, through Sims and McGuire, there were annexed letters of November 26, 1937, December 10, 1937, December 13, 1937, and December 21, 1937, from the Liquida-

tion to Tatum and from Tatum to the Liquidation. In the letter of December 10th, it is said:

> "(e) On behalf of our trust, we, in accordance with our telephone conversation, will reserve all mineral rights upon or beneath the lands which we proffer to convey to you by warranty, situated only in Township 1 North and Township 2 North, Range 16 West, Lamar County, Mississippi, * * *."

But note that this was the agreement at December 10, 1937; but why, on December 30th, did Brock, the constitutional State Bank Commissioner, acting under a recited order of the Civil District Court, write into the deed which he gave to Tatum that which he put in?

(g) When the Louisiana courts have the original deed, the collateral agreement and the order authorizing the original deed (which has never been before a Mississippi court), it can then and will then effectively advise this Court by declaration as to that which is the Louisiana law; and when it shall so do, our submission is that there probably will be no Federal question, because the Supreme Court of Louisiana will confirm our contentions. When that Court so thus does, then it will be mandatory upon this Court to direct the Supreme Court of Mississippi to accept this admeasurement of the respective rights. Compare *Fauntleroy* v. *Lum*, 210 U.S. 230, 52 L.ed. 1039; *Simons* v. *Miami First National Bank*, ... U.S. ....., 14 L.ed. 2d 232. This order of December 30, 1937, of the Civil District Court, we admit, if it were before this Court, presents difficulties—possibly serious difficulties—for the Petitioners. As to these propositions, the decision of the State Court is binding on this Court. *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 12 L.ed. 2d 256.

(h) The Respondents are validly before this Court. It is obligated to conform to the Constitution and if it re-

fuses certiorari and the Petitioners did not make this motion so that this Court could have before it that which would be conclusive on it, then this Court, by thus refusing to give to Petitioners that which is requisite for this Court to perform its constitutional function, would deprive the Petitioners of the property without due process. *Angel* v. *Bullington*, 330 U.S. 183, 91 L.ed. 832. That which, with deference, Petitioners insist upon is that when this Court can so be informed, as it could be in this case, by the Supreme Court of Louisiana, its duty is not to take Petitioners' property. If the Supreme Court of Louisiana holds under Louisiana law that the sole reservation is "oil, mineral, gas and petroleum", the substitution by this Court on this Writ will be an easy matter. The Supreme Court of Mississippi will be compelled to conform.

The United States still continues in possession of the Tatum Salt Dome and has renewed its lease thereon, but what will be its course thereasto is purely speculative.

The Constitution and statutes of the United States (Appendix "E" and "F") and the Constitution and statutes of Louisiana (Appendix "G") are appended to the Petition and, with deference, reference is made thereto.

The relationship of the Reconstruction Finance Corporation was such that the sale to Tatum could not be had until it consented and apparently that consent was given after December 21, 1937. Compare for relationship, if the Court may judicially notice, *In re Hibernia Bank & Trust Co.*, 205 La. 890, 18 So.2d 330.

This supplemental statement is to be taken in connection with the Statement of the Case made by Petitioners in the Petition for Writ of Certiorari, p. 4.

Authorities

Since A. Clayton James has expressed himself as hereinbefore set forth, it is respectfully submitted, with deference:

1. *Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 3 L.ed. 2d 562, is controlling and pursuant thereto this Court should retain jurisdiction until the Supreme Court of Louisiana shall have determined the property rights, for when it so does probably no Federal constitutional questions will exist. In *Southern Bell Tel. & Tel. Co.* v. *Meridian*, D.C. Miss., 154 F. Supp. 736, when District Judge Mize had determined the cause, basing his decision upon the Contract Clause of the *United States Constitution*, and when the Court of Appeals, *Meridian* v. *Southern Bell Tel. & Tel. Co.*, C.A. 5, 256 F.2d 83, had affirmed, this Court reversed the Court of Appeals so that the Supreme Court of the State of Mississippi might determine the basic local rights of the Telephone Company and thereby relieve this Court from the effort and time essential for adjudications of the underlying constitutional questions, saying, 358 U.S. 639, 640, 3 L.ed. 2d 562, 563:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. See Railroad Com. v. Pullman Co., 312 U.S. 496, 85 L.ed. 971, 61 S. Ct. 643. That is especially desirable where the questions of state law are enmeshed with federal questions. Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105, 89 L.ed. 101, 103, 65 S. Ct. 152. Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. Cf. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 84 L.ed. 876, 880, 60 S. Ct. 628. In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may

obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily. Railroad Com. v. Pullman Co., (U.S.) supra; Spector Motor Service, Inc. v. McLaughlin, supra (323 U.S. 104, 105). See Leiter Minerals, Inc. v. United States, 352 U.S. 220, 228, 229, 1 L.ed. 2d 267, 274, 275, 77 S. Ct. 287.

"The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court for proceedings in conformity with this opinion."

The subsequent history of this decision here is:

(a) *Louisiana Power & Light Company* v. *Thibodaux*, 360 U.S. 25, 32, 3 L.ed. 2d 1058, 1064, dissenting opinion of Mr. Justice Brennan:

"* * * Numerous decisions since then have sanctioned abstention from deciding cases involving a federal constitutional issue where a state court determination of state law might moot the issue or put the case in a different posture. See, e.g., Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 3 L.ed. 2d 562, 79 S. Ct. 455; * * *. Abstention has also been sanctioned on grounds of comity with the States—to avoid a result in 'needless friction with state policies.' Railroad Com. v. Pullman Co., 312 U.S. 496, 500, 85 L.ed. 971, 974, 61 S. Ct. 643. Thus this Court has upheld an abstention when the exercise by the federal court of jurisdiction would disrupt a state administrative process, Burford v. Sun Oil Co., 319 U.S. 315, 87 L.ed. 1424, 63 S. Ct. 1098; * * *."

(b) In *County of Allegheny* v. *Frank Mashuda Company*, 360 U.S. 185, 189, 3 L.ed. 2d 1163, 1166, this Court said:

"This Court has sanctioned a federal court's postponement of the exercise of its jurisdiction in cases presenting a federal constitutional issue which might

be mooted or presented in a different posture by a state court determination of pertinent state law. See, e.g., Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 3 L.ed. 2d 562, 79 S. Ct. 455; * * *."

(c) See *Baggett* v. *Bullitt*, 377 U.S. 360, 376, 12 L.ed. 2d 377, 388.

(d) See Annotation, "Discretion of federal court to remit relevant state issues to state court in which no action is pending", 3 L.ed. 2d 1827, 1831; 94 L.ed. 879.

2. The majority of this Court said in *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25, 30. 3 L.ed. 2d 1058, 1062:

"In light of these considerations the immediate situation quickly falls into place. In providing on his own motion for a stay in this case, an experienced district judge was responding in a sensible way to a quandary about the power of the City of Thibodaux into which he was placed by an opinion of the Attorney General of Louisiana in which it was concluded that in a strikingly similar case a Louisiana city did not have the power here claimed by the City. A Louisiana statute apparently seems to grant such a power. But that statute has never been interpreted, in respect to a situation like that before the judge, by the Louisiana courts and it would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours.

"Caught between the language of an old but uninterpreted statute and the pronouncement of the Attorney General of Louisiana, the district judge deter-

> mined to solve his conscientious perplexity by directing utilization of the legal resources of Louisiana for a prompt ascertainment of meaning through the only tribunal whose interpretation could be controlling—The Supreme Court of Louisiana. The District Court was thus exercising a fair and well considered judicial discretion in staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana."

Mr. Justice Brennan, The Chief Justice and Mr. Justice Douglas, assumed to dissent in that case, but, with deference, that dissent does not, we submit, preclude abstention:

(1) It is said in the dissent, 360 U.S. 32, 3 L.ed. 2d 1064:

> "* * * The doctrine of abstention, in proper perspective, is an extraordinary and narrow exception to this duty, and abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve one of two important countervailing interests: either the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships."

Unquestionably exclusive jurisdiction over the Supreme Court of Mississippi is vested here and this cause has been carried diligently as far as this Court where it is properly pending; but this Court, with deference, is confronted with serious constitutional questions because it is uncertain as to the laws of Louisiana.

(2) This dissent appropriately cited *Railroad Com.* v. *Pullman Co.*, 312 U.S. 496, 85 L.ed. 971, as properly decided and on this decision we rely.

(3) The basis, frankly, of the dissent is appositely put, 360 U.S. 33, 3 L.ed. 2d 1064:

> "But neither of the two recognized situations justifying abstention is present in the case before us. * * *."

The subsequent history of *Louisiana Power & Light Co.* v. *Thibodaux, supra,* is as follows:

(a) It was cited by Mr. Justice Goldberg in *Fortson* v. *Toombs,* 379 U.S. 621, 13 L.ed. 2d 527, 534, but therein naught contra appears.

(b) In *Hostetter* v. *Idlewild Liquor Corp.,* 377 U.S. 324, 329, 12 L.ed. 2d 350, there had been no application to the District Court for abstention. The case had been vigorously and for a long time litigated and the Court held, after such litigation, that the District Court not having abstained until the question could be determined in the State Court, there was no abuse of discretion by the District Judge.

(c) In *Griffin* v. *School Board of Prince Edward County,* 377 U.S. 218, 229, 12 L.ed. 2d 256, 264, this Court as to abstinence until the Supreme Court of Appeals of Virginia made its adjudication was held inapposite because, as the opinion remarked:

> "* * * In the first place, the Supreme Court of Virginia has already passed upon the state law with respect to all the issues here. * * *."

(d) In *Garner* v. *Louisiana,* 368 U.S. 157, 189, 7 L.ed. 2d 157, 228, Mr. Justice Harlan said:

> "Moreover, the kind of speculation in which the Court has indulged as to the meaning of the Louisiana statute is surely out of keeping with the principle that federal courts should abstain from constitutional decision involving doubtful state law questions until a clarifying adjudication on them has first been obtained from the state courts. See Railroad Com. v. Pullman

Co., 312 U.S. 496, 500, 85 L.ed. 971, 974, 61 S. Ct. 643; Harrison v. National Asso. for Advancement of Colored People, 360 U.S. 167, 3 L.ed. 2d 1152, 79 S. Ct. 1025. Cf. Glenn v. Field Packing Co., 290 U.S. 177, 78 L.ed. 252, 54 S. Ct. 138; Leiter Minerals, Inc. v. United States, 352 U.S. 220, 228, 229, 1 L.ed. 2d 267, 274, 275, 77 S. Ct. 287; Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 3 L.ed. 2d 1058, 79 S. Ct. 1070. If there be doubt as to how the statute was construed in this respect, the cases should be returned to the Louisiana Supreme Court for clarification of its judgments. See Herb v. Pitcairn, 324 U.S. 117, 89 L.ed. 789, 65 S. Ct. 459."

But in the majority opinion (having reference to the fact that the judgments entered by the Civil District Court authorizing the acts of the Bank Commissioner do not appear) it was said, 368 U.S. 173, 7 L.ed. 2d 219:

"* * * Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process. Ohio Bell (U.S.) supra."

(e) Note *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 212, 4 L.ed. 2d 1170, 1176, wherein the majority said:

"* * * But, as the Court of Appeals indicated, it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute. See, e.g., Hoagland v. Railroad Express Agency, Inc., (Fla.) 75 So.2d 822; Equitable Life Assur. Soc. v. McRee, 75 Fla. 257, 78 So. 22. The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla. Stat. Ann. 1957, Sec. 25.031. Even without such a facilitating statute we have frequently

> deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law. See Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 189, 3 L.ed. 2d 1163, 1166, 79 S. Ct. 1060, and cases cited; see also Meredith v. Winter Haven, 320 U.S. 228, 236, 88 L.ed. 9, 14, 64 S. Ct. 7."

There was a dissent by Mr. Justice Black, with whom the Chief Justice and Mr. Justice Douglas joined, but the principal predicate for the dissent was, 363 U.S. 213, 4 L.ed. 2d 1176:

> "* * * I agree that it is frequently better not to decide constitutional questions when decision of non-constitutional questions also presented will dispose of a case. But I do not agree that this is such an occasion. The state law questions do not call for first interpretation of a broad, many-pronged, state regulatory scheme. * * * Nor are the state questions here difficult ones depending on ambiguous or vague state law, but instead they border on the frivolous. Since I think the answer to the constitutional question also is clear, I believe we should decide all the questions in the case. * * *."

It is submitted that that appropriately determined therein is not contra. As above remarked, this Court does not know what the judgment entered in the Civil District Court determined and that whereasto full faith and credit must be vouchsafed not appearing, the sole remedy therefor in this Court must be made available.

(f) Compare *Martin* v. *Creasy*, 360 U.S. 219, 226, 3 L.ed. 2d 1186, 1190, where in a concurring opinion Mr. Justice Black appropriately quoted *Louisiana Power & Light Co.* v. *Thibodaux, supra.*

(g) Compare *United Services Life Insurance Company* v. *Delaney*, C.A. 5, 328 F.2d 483, wherein it is said, p. 484:

"The two appeals are to be decided by the law of Texas, by which the insurance contracts are to be construed and from which the meaning of the contracts is to be determined. The guidance of the dim light of the Texas decisions leaves the meaning of the questioned clauses obscure. Without further enlightenment any judgment we might pronounce would be 'a forecast rather than a determination.' Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 499, 61 S. Ct. 643, 644, 85 L.ed. 971. The Supreme Court has 'increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law.' Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S. Ct. 1070, 3 L.ed. 2d 1058, reh. den. 360 U.S. 940, 79 S. Ct. 1442, 3 L.ed. 2d 1552. * * *."

Judge Brown concurred, saying, p. 486:

"* * * Though our decisions survive the discretionary review of certiorari, most of the time because they are really not 'certworthy', Harlan, J. in Tipton v. Socony Mobil Oil Co., 1963, 375 U.S. 34, 84 S. Ct. 1, 11 L.ed. 2d 4 (dissenting opinion), many of them do not *fare so well when they are tested in the place that really counts*—the highest, or first-writing court, of the State concerned. See Ford Motor Co. v. Mathis, 5 Cir., 1963, 322 F.2d 267. Within the very recent past, both Texas and Alabama have overruled decisions of this Court, and the score in Florida cases is little short of staggering. In similar, but subsequent, cases, the Florida Courts have expressly repudiated our holdings in a number of cases. And now that we have this remarkable facility of certification, we have not yet 'guessed right' on a single case. And within the month we have had to reach back over 2 years to grant a belated second petition for rehearing to completely undo our decision in Maryland Casualty Co. v. Hallatt, 5 Cir., 1961, 295 F.2d 64, because of an intervening, authoritative express disapproval of it by the Florida Courts notwithstanding the fact that on remand a second trial had been had which resulted in victory for the insurance

company. He who had lost now won, and he who had won now lost. Maryland Casualty Co. v. Hallatt, 5 Cir., 1964, 326 F.2d 275."

As therein pointed out, the statute of Florida for certification does not preclude an Article III court from the exercise of its constitutional judicial powers. Judge Brown further said, p. 487:

"*** * As a Court of Appeals, our decision in a diversity case is for all practical purposes final and irretrievable as to those parties and that cause of action. The Supreme Court, within its physical capacity, cannot entertain any such cases as to the merits of the state question. When such cases get there, it is almost always because of some federally assured procedural right, such as the Seventh Amendment, Federal Rules of Civil Procedure on discovery, or the like. The law announced by us becomes the law of the Medes and Persians which altereth not until the state authoritatively declares the law to be otherwise. When the subsequent state declaration is made, our former opinion evaporates as though it never existed. 'The Moving Finger writes, and having writ, moves on. But it may be that having written, what we write is soon erased.' Ford Motor Co. v. Mathis, 5 Cir., 1963, 322 F.2d 267. But in the meantime, the litigants in the federal diversity case have suffered a loss of rights, or have been subject to burdens which the local law does not support. Thus it is that the only person who is hurt is the one who has no effective recourse to correct the error. Cf. Tipton v. Socony Mobil Oil Co., 5 Cir., 1963, 315 F.2d 660, 662, 667, 1963 AMC 1800, 1803, 1809 (dissenting opinion), reversed per curiam, 1963, 375 U.S. 34, 84 S. Ct. 1, 11 L.ed. 2d 4."

But, with deference, herein by this Court rectification may be wrought with certainty.

(h) Note *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L.ed. 2d 440. Therein abstinence was main-

tained, the Court saying, 375 U.S. 415, 421, 11 L.ed. 2d 445, 448:

> "* * * Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.' Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 29, 3 L.ed. 2d 1058, 1062, 79 S. Ct. 1070. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. Accordingly, we have on several occasions explicitly recognized that abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.' Harrison v. NAACP, 360 U.S. 167, 177, 3 L.ed. 2d 1152, 1158, 79 S. Ct. 1025; accord, Louisiana P. & L. Co. v. Thibodaux, supra, 360 U.S. at 29, 3 L.ed. 2d at 1062.
>
> * * *
>
> "Despite these uncertainties arising from application of Windsor—which decision, we repeat, does not require that federal claims be actually litigated in the state courts—a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the 'reservation to the disposition of the entire case by the state courts' that we referred to in Button. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. * * *."

But, with deference, when the Supreme Court of Louisiana has answered those questions whereasto abstention has

been made, with deference, it should be easy for this Court to dispose of the Petition for Writ of Certiorari; but Petitioners do not forego their constitutional rights in this Court.

(i) With deference, naught in *Government Employees* v. *Windsor*, 353 U.S. 364, 1 L.ed. 2d 894, and *Dombrowski* v. *Pfister*, ... U.S. ....., 14 L.ed. 2d 22, conflicts with our contentions.

Questions of Louisiana law, with deference, require determination appropriately by the Supreme Court of Louisiana. That this rule is applicable to this high Court is conclusively established, if, with deference, there be such local questions. The exclusive jurisdiction was vested under the Constitution and laws of Louisiana in the State Bank Commissioner, subject to certain supervisory jurisdiction in the Civil District Court. The pertinent Louisiana decisions dealing directly or collaterally therewith are: *Hiern* v. *Interstate Trust & Banking Co.*, 178 La. 998, 152 So. 684; *In re Liquidation of Hibernia Bank & Trust Co.*, 205 La. 890, 18 So.2d 330; *In re Hibernia Bank & Trust Co.*, 203 La. 195, 13 So.2d 833; *Dowling* v. *Canal Bank & Trust Co.*, 216 La. 372, 43 So.2d 763; *Liquidation of Canal Bank & Trust Co.*, 211 La. 803, 30 So.2d 841; *Interstate Trust & Banking Co.* v. *Jones County, Miss.*, C.A. 5, 77 F.2d 806.

The deed to Tatum with the reservation was recorded in Lamar County in Book GG, page 515. This deed was specifically referred to as delivered in the collateral agreement whereto the correspondence was attached. Possession was taken pursuant to this provision and continues. It is true that learned counsel for Respondents did not see fit to introduce the petition and order made on December 30, 1937, and referred to in the deed; but the counsel for the Respondents was our most outstanding ex-President of the American Bar Association and thoroughly familiar with that

which would profit the Respondents and voluntarily, with deference, used this strategem and is estopped thereby. Compare *Henry* v. *Mississippi*, 379 U.S. 443, 13 L.ed. 2d 408, 415. But more important, Respondents, when this form of the reservation had been of record for more than twenty years, bid for that purchased as there disclosed of record and filed in the Civil District Court an Opposition which was sustained and whereunder for $215,190.00 Respondents received a deed to the reservation made in ipssimis verbis and accepted delivery of that deed and continue to hold therethrough. The effect of so doing cannot be appraised by this Court when the petition and the order thereasto do not appear in the record.

The next form of the reservation quoted by Mr. Justice Brady from the letter of December 10, 1937, from Hibernia to Tatum reads, 171 So.2d 138:

> "(e) On behalf of our trust, we, in accordance with our telephone conversation, will reserve all mineral rights upon or beneath the lands which we proffer to convey to you by warranty, situated only in Township 1 North and Township 2 North, Range 16 West, Lamar County, Mississippi, * * *."

But note that this collateral agreement to which the letter was attached was never filed for record. Note further that the Reconstruction Finance Corporation had not assented to these terms. Further that John Yeager, the Mississippi attorney for the Liquidation, was not selected until December 29, 1937, and that after his selection the description agreed upon precedently was not used, but on the contrary the terms in the deed were "oil, mineral, gas and petroleum". The surrounding circumstances thereasto do not appear. But, with deference, with these two reservations set forth in the opinion of Judge Brady as being ambiguous in accordance with Mississippi law and not the civil law of Louisiana, Judge Brady assumed to award "all the minerals and mineral rights, including oil, gas and other hydrocar-

bons, sulphur, gravel, salt and all other minerals and mineral rights in, on and under the lands described" which is basically and fundamentally different from either that in the deed delivered or the description agreed upon before December 21, 1937; and yet the Mississippi law thus invades the sovereignty of Louisiana under circumstances which do not appear in this record in full. The obligation rests upon this Court to fulfill the Full Faith and Credit Clause. Compare *Crider* v. *Zurich Ins. Co.*, 380 U.S. 39, 13 L.ed. 2d 641; *Relf* v. *Rundle*, 103 U.S. 222, 26 L.ed. 337, and others, Petition pages 8, 17, 19, 27, 28 and 29.

Most impressive is that the State of Louisiana, acting through J. S. Brock, State Bank Commissioner, and J. W. Jeansonne, State Bank Commissioner, allowed Petitioners to appropriate the gravel as their own for a period of twenty years, but Mr. Justice Brady as at October 7, 1959, severed the deed so as to award the gravel thereafter to Respondents. Furthermore, W. S. F. Tatum died long before 1959, and when the Liquidation, under the order of the Civil District Court, undertook to sell the reservation, neither Tatum nor any of his grantees were made parties thereto and yet through Mr. Justice Brady's opinion there was assumed to be divested from Petitioners and invested in Respondents that by him awarded, namely: "all the minerals and mineral rights, including oil, gas and other hydrocarbons, sulphur, gravel, salt and all other minerals and mineral rights in, on and under the lands described". Before such divestiture could be made, the Supreme Court of Louisiana required, with deference, that the Petitioners should have been represented when this hearing in the Opposition was had and the title directed to be conveyed, if, as Mr. Justice Brady contends, there was then being divested from Petitioners and vested in Respondents much property in addition to oil, mineral, gas and petroleum. The Mississippi Court undertook to apply Mississippi law to Tatum deed, relying upon decisions of Mississippi's Court

alleged to be contra to Petitioners' demands; especially did the opinion delete the doctrine of *noscitur a sociis* and *ejusdem generis* (*Garner* v. *Louisiana*, 368 U.S. 157, 168, 7 L.ed. 2d 207, 216) from the reservation "oil, mineral, gas and petroleum", especially as to "mineral" when Mississippi's Court had expressly held in *Witherspoon* v. *Campbell*, 219 Miss. 640, 69 So.2d 384, following this Court's opinion in *Northern Pacific R. Co.* v. *Soderberg*, 188 U.S. 526, 47 L.ed. 575, that "mineral" as used took its meaning from its associates. Under *Fox* v. *Pearl River Lumber Co.*, 80 Miss. 1, 31 So. 583, land in Mississippi may be severed into timber, soil and minerals, each an independent fee.

The petition and order of the Civil District Court being absent, the surrounding facts and circumstances not having been developed, the questions of law that are apposite and must be determined by the Supreme Court of Louisiana are set forth in the Petition and reference thereto for them is respectfully made.

So as to avoid the Federal constitutional questions entirely or to have them so presented with the lines as to State sovereignty clearly made plain, it is submitted that abstention should be granted in accordance with this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Garner W. Green, one of the attorneys for the Petitioners herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served printed copies of the foregoing Motion for Abstention on the Respondents in the manner following:

1. By mailing 1 copy thereof in a duly addressed envelope, with postage prepaid, to John C. Satterfield, Esquire, Yazoo City, Mississippi;

2. By mailing 4 copies thereof in a duly addressed envelope, with postage prepaid, to Frank T. Williams, Esquire, Satterfield, Shell, Williams & Buford, 340 First National Bank Building, Jackson, Mississippi; and

3. By mailing 1 copy thereof in a duly addressed envelope, with postage prepaid, to M. M. Roberts, Esquire, Citizens Bank Building, Hattiesburg, Mississippi.

I further certify that I have caused to be mailed, postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D. C. 20530.

This the ..... day of September, 1965.

.....

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APPENDIX "A"

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File No. 265

July 14, 1965

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IN RE: Hibernia Bank and Trust Company
in Liquidation—Tatum

Dear Mr. Green:

Joseph J. Cangiamilla, Special Agent, for the Hibernia Bank and Trust Company, in Liquidation, has referred to me your letters of June 14th and July 10th, 1965.

It is with regret that I inform you that the Liquidation will be unable to execute the Deed of Confirmation and Ratification that you requested. As you state in your letter, (a great many of the actors in this transaction are now dead; and the records are somewhat possibly destroyed); and it is impossible for A. Clayton James, the State Bank Commissioner, and Joseph J. Cangiamilla, the Special Agent for the Liquidation, to know what actually was the intent of the parties at the time. Obviously, there is much ambiguity surrounding the transaction because the Supreme

Court of Mississippi has already reversed the decision of the Chancellor.

Please understand that Mr. James, Mr. Cangiamilla, and myself are not trying to be uncooperative. We simply can not take it upon ourselves to grant the requested Deed of Confirmation and Ratification when we were not totally familiar with the intention of the parties. I will be very happy to discuss the matter with you.

Very truly yours,

/s/ Ben Daly Bridgeman
Ben Daly Bridgeman

BDB:jmr
cc: Mr. Joseph J. Cangiamilla

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 180

S. TATUM, ET AL.,
Petitioners,

vs.

JOE B. SINGER, ET AL.,
Respondents.

REPLY BRIEF OF RESPONDENTS UPON MOTION FOR ABSTENTION

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